Duta Arif Sdn Bhd & Ors v Chartered Development Corp & Ors

HIGH COURT (KUCHING) — SUIT NO 22–59 OF 2003-II
HAMID SULTAN JC
25 JULY 2007

Civil Procedure — Striking out — Statement of claim — Whether appellants' statement of claim ought to have been struck out — Whether there was reasonable cause of action — Whether claim frivolous and vexatious — Whether clearly an that abuse of process of court — Rules of the High Court 1980 O 18 rr 7(1), 19(a), (b), (c) &(d)

The appellants/plaintiffs appealed against the decision of the learned deputy registrar who allowed the respondent/third defendant's application to strike out the statement of claim. There was privity of estate and/or covenants in equity existing between the first plaintiff and the first, second and third defendants (the owner of the piece of land and the principal or employer under the project) pertaining to the development of Putrajaya. The first plaintiff had done all obligations under the subcontract when the first defendant terminated and/or suspended the said subcontract causing immense loss and damage to the plaintiffs. The plaintiffs claimed against the defendants jointly and severally, inter alia, for a declaration that the said subcontract had been cancelled or rescinded and was not binding on them (alternatively an order for rescission), for an order for the return or refund of sums of money (deposits and licence fees), for payment of special and general damages. The appellants had also taken some procedural objections, inter alia, that there was no intitulement in the summons in chambers and that the application under O 18 r 19 (a), (b), (c) or (d) of the Rules of the High Court 1980 ('RHC') was defective. The respondent in opposing the appeal submitted, inter alia, that the case was plain and obvious and that the application ought to be granted, the appellants failed to plead a reasonable cause of action, the claim was frivolous and vexatious, the appellants had offended O 18 r 7(1) of the RHC, the appellants' cause of action was uncertain and ambiguous and there was law being pleaded and it was an abuse of court process.

Held, allowing the appeal:

(1) The principles and practice relating to striking out pleadings are well

settled. The courts will only dismiss an action: (i) in plain and obvious cases; (ii) where there was no reasonable cause of action; (iii) to avoid unnecessary trial which had no prospects of success; (iv) the claims are frivolous or vexatious or an abuse of process of court or the defences are unarguable (see para 8).

(2) Therefore, pursuant to the Labour Ordinance of Sarawak, the third defendant, being the principal or employer, was liable to its contractor and subcontractor for all works and/or services contained in any contract of works and/or services with the principal or employer. This was a matter which warranted the court to allow the plaintiffs to sustain the action (see para 8).

[Bahasa Malaysia summary

Perayu-perayu/plaintif-plaintif telah merayu terhadap keputusan-keputusan timbalan pendaftar yang bijaksana yang telah membenarkan permohonan responden/defendan ketiga untuk membatalkan penyataan tuntutan. Priviti harta pusaka dan/atau waad dalam ekuiti yang wujud antara plaintif pertama dan defendan-defendan pertama, kedua dan ketiga (pemilik sebidang tanah dan prinsipal atau majikan di bawah projek tersebut) berkaitan pembangunan Putrajaya. Plaintif pertama telah melaksanakan kesemua obligasinya di bawah subkontrak apabila defendan pertama menamatkan dan/atau menggantung subkontrak tersebut mengakibatkan kerugian dan kerosakan teruk kepada plaintif-plaintif. Plaintif-plaintif telah menuntut terhadap defendan-defendan secara bersama dan berasingan, antara lain, untuk deklarasi bahawa subkontrak tersebut telah dibatalkan atau ditamatkan dan tidak mengikat ke atas mereka (secara alternatifnya untuk pembatalan), untuk satu perintah pengembalian atau pemulangan semula jumlah wang (deposit dan yuran lesen), untuk pembayaran ganti rugi khas dan am. Perayu-perayu juga telah mengambil beberapa bantahan prosedur, antara lain, bahawa tiada tajuk dalam saman dalam kamar tersebut dan bahawa permohonan di bawah A 18 k 19(a), (b), (c) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah cacat. Responden dalam membantah rayuan itu menghujahkan, antara lain, bahawa kes tersebut adalah jelas dan nyata dan bahawa permohonan itu patut dibenarkan, perayu-perayu telah gagal untuk memplidkan kausa tindakan yang munasabah, tuntutan itu adalah remeh dan menyusahkan, perayu-perayu telah melanggar A 18 k 7(1) KMT, kausa tindakan perayu-perayu tidak tentu dan tidak jelas dan terdapat undang-undang yang diplidkan dan ia adalah penyalahgunaan proses mahkamah.

Diputuskan, membenarkan rayuan:

(1) Prinsip-prinsip dan amalan berkaitan pembatalan pliding telah

ditetapkan. Mahkamah akan hanya menolak tindakan: (i) dalam kes-kes yang nyata dan jelas; (ii) di mana tiada kausa tindakan yang munasabah; (iii) untuk mengelakkan perbicaraan yang tidak perlu yang tidak menampakkan prospek untuk berjaya; (iv) tuntutan-tuntutan adalah remeh atau menyusahkan atau suatu penyalahgunaan proses mahkamah atau pembelaan-pembelaan tidak boleh dipertikaikan (lihat perenggan 8).

(2) Oleh itu, menurut Ordinan Buruh Sarawak, defendan ketiga, yang merupakan prinsipal atau majikan, adalah bertanggungjawab terhadap kontraktor dan subkontraktornya untuk semua kerja dan/atau perkhidmatan yang terkandung dalam mana-mana kontrak kerja dan/atau perkhidmatan dengan prinsipal atau majikan. Ini merupakan perkara yang mewajarkan mahkamah membenarkan plaintif-plaintif mengekalkan tindakan tersebut (lihat perenggan 8).]

Notes

For cases on striking out of statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6750–6786.

Cases referred to

Adib bin Mokhtar & Ors v Jason Chan Chee Khong & Anor [1999] 2 MLJ 473 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Crystal Realty Marketing Sdn Bhd v Hicom United Leasing Sdn Bhd [2008] 1 MLJ 142 (refd)

Drummond-Jackson v British Medical Association [1970] 1 All ER 1094 (refd)

Gabriel Peters & Partners v Wee Chong Jin [1998] 1 SLR 374 (refd)

Goh Koon Suan v Heng Gek Kiau [1992] 2 MLJ 307 (refd)

Hardial Singh Sekhon v Ahmad bin Haji Ramli & Ors [1981] MLJ 96 (refd)

Kim Hok Yung & Ors v Cooperative Centrale Raiffeisen-Boerenleenbank BA (t/a Rabobanl) (Lee Mon Sun, third party) [2000] 4 SLR 508 (refd)

Lee Siew Kow, Re, deceased [1951] MLJ 224 (refd)

Ng Wu Hong v Abraham Verghese a/l TV Abraham & Ors [2008] 7 MLJ 45 (refd)

Tapematic Spa v Wirana Pte Ltd & Anor [2002] 4 SLR 953 (refd)

Thomas & Betts (SE Asia) v Ou Tin Joon (27 February 1998, unreported) (refd)

Tractors Malaysia Bhd v Tio Che Hing [1975] 2 MLJ 1 (refd)

Wong See Leng v Saraswathy Ammal [1954] MLJ 141 (refd)

Legislation referred to

Labour Ordinance of Sarawak

Rules of the High Court 1980 O 18 r 7, O 18 r 7(1), O 18 r 19(1)(a), O 18 r 19(1)(b), O 18 r 19(1)(c), O 18 r 19(1)(d), O 18 r 19(2), O 56

Tai Choi Yu (Tai Choi Yu & Co) for the plaintiffs/appellants.
Alice Loke Yee Ching (Senior Federal Counsel, Attorney General's Chambers) for the third defendant/respondent.

Hamid Sultan JC:

[1] This is my judgment in respect of the appellants/plaintiffs' appeal against the decision of the learned deputy registrar who allowed the respondent/third defendant's application to strike out the statement of claim.

[2] The appellants say their cause of action is based on the following: (i) the third defendant is the owner of and/or beneficiary of approximately 4400 hectares of land granted by the Government of Selangor for the development of Federal Administrative Centre at Putrajaya ('Putrajaya project'). The development works were granted to the second defendant. The first and second defendants entered into a contract for the Putrajaya project ('main contract'). The main contract was subcontracted to the first plaintiff. By reason of the aforesaid, a privity of estate and/or covenants in equity exist between the first plaintiff and the first, second and third defendants whereby the land relating to Putrajaya project is burdened and/or encumbered with; (ii) the first plaintiff had done all obligations under the subcontract when the first defendant terminated and/or suspended the said subcontract causing immense loss and damage to the plaintiffs; (iii) the third defendant is named and/or sued as a party by virtue of its position as the owner of the Putrajaya project and also in its capacity as the principal or employer under the Putrajaya project, the main contract and the subcontract under the provisions of the Sarawak Labour Ordinance whereby the principal or employer is liable under statute to its subcontractor and/or the first plaintiff under the subcontract; and (iv) the plaintiffs, inter alia, claim against the defendants (a) as against the first, second and third defendants jointly and severally: (i) for a declaration that the said subcontract dated 9 June 1997 had been cancelled and/or terminated and/or rescinded in law and/or is not binding on them; (ii) and/or alternatively an order for the rescission of the said subcontract dated the 9 June 1997; (iii) for an order for the return and/or refund of utility deposit, the security deposit and the unused licence fee of RM40,000, RM20,000 and RM3,661,108.08 respectively making a total of RM3,721,108.08; (iv) for payment of the said sum of RM2,386,515.48; (v) for special damages of RM160,000; (vi) for general damages, interest, costs, etc.

[3] The appellants have taken a number of procedural objections namely:

(i) there was no intitulement in the summons in chambers.

(ii) the said application under O 18 r 19(1)(a), (b), (c) or (d) is defective and fatally flawed as it is disjunctive and the respondent has not elected as to which subparagraph they are relying on.

[4] The respondent's case and the procedural objections of the appellants before the learned deputy registrar are well articulated in a simple and lucid manner by the learned deputy registrar and reads as follows:

> It is clear from the third defendant's application that the application is made pursuant to O 18 r 19(1)(a) or (b) or (c) or (d) of the Rules of the High Court 1980. The plaintiffs are thus made aware of the relevant rules relied upon by the third defendant. The rule with regard to intitulement and the rationale underlying such requirement is to give notice to the opposing side the relevant rules of court or statute relied upon. Therefore the issue of non-intitulement in the third defendant's application is not a ground to strike out the third defendant's application. On the plaintiff's objection to the application being made under the various paragraphs of O 18 r 19 and places reliance on the case of *Asia Commercial Finance (M) Berhad v Leong Choong Shin* [1997] 5 MLJ 17, I am agreeable with learned counsel for the third defendant that an application under O 18 r 19 can be premised on one or more of the various paragraphs in the said order, subject however to affidavit evidence being disregarded when considering ground (a). The mandatory provision of O 18 r 19(2) cannot be ignored. It was held in *Malayan United Finance Bhd v Cheung Kong Plantation Sdn Bhd & Ors* [2000] 2 MLJ 38 that:
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> > Paragraphs (a) to (d) of O 18 r 19(1) are 'disjunctive. This means that an applicant may apply any one of the paragraphs in his application. The usage of the word 'or' between the paragraphs cannot be a ground to say that para (a) cannot be applied together with the other paragraphs. The reason being, if that was the submission, para (b), (c) and (d) also cannot be applicable together, on the same grounds.
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> (See also *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259 and *Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd* [1996] 2 MLJ 238).
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> I would therefore proceed to consider the third defendant's application in light of the affidavits and submissions of both parties. A reasonable cause of action connotes a cause of action, which has some chance of success when only the allegations in the pleading are considered (see *Drummond-Jackson v British Medical Association* which was quoted with approval in *Gabriel Peters & Partners v Wee Chong Jin* [1998] 1 SLR 374). Thus, in order to decide if the pleading disclose a reasonable cause of action, an examination of the statement of claim paragraph by paragraph, is inevitable.

Having considered the submissions of both counsel, the affidavits and authorities cited, and having due consideration of the facts pleaded, I agree with learned counsel for the third defendant that one is still in the dark as to the claim against the third defendant on the following grounds:

(1) The plaintiffs have failed to show any direct link between the plaintiffs and the third defendant. Though para 7 is an attempt to link the third defendant to plaintiff, vide the first and second defendant, it fails to clarify the claim by the plaintiffs against the third defendant. I agreed with learned counsel for the third defendant that the preceding paragraphs merely contain particulars of the main contract between first and second defendant (para 5), and the subcontract between plaintiffs and the first defendant (para 6).

(2) The facts pleaded do not even remotely disclose any cause of action in law against the third defendant and therefore the plaintiffs' claim is untenable and must fail.

(3) The relief claimed against the third defendant is in respect of a subcontract entered into between the first plaintiff and the first defendant. It is the first defendant whom the plaintiffs allege had breached the subcontract agreement. Therefore the claim ought to be against the same party that the plaintiff sues for damages arising from the breach of the subcontract. There is no privy of contract between the first plaintiff and the third defendant. As a result, the third defendant has been unjustifiably made a party to the action and is clearly frivolous, vexatious and an abuse of court process.

For the above reasons, I allowed the third defendant's application.

[5] In this instance, I have to say that this appeal under O 56 is by way of rehearing and is not meant to be a mission to discover how the learned deputy registrar had erred in law or fact by the parties to the proceeding. As the respondent has not taken objection, I will take the liberty to deal with this matter at a later stage in this suit.

[6] The appellants in support of the appeal say that they rely on the submission before the learned deputy registrar and assert: (i) it is obvious that the third defendant is the owner with beneficial interest in all lands in Malaysia whether on alienation or on reversion; (ii) further, the third defendant is also the principal and/or chief contractor or party to the development and construction of Putrajaya and of which the second defendant is its nominee or agent or representative; (iii) in consequence, under terms of the contract, rights and obligations will flow back to the third defendant; further in term of the demise or grant of rights and interest to land these rights and interest will revert back and/or bind the third defendant as well.

[7] The respondent in opposing the appeal, inter alia, submits:

(i) this is a plain and obvious case where an order in terms of the application sought ought to be granted. The principles relating to striking out are well settled. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, Mohamad Dzaiddin SCJ said (at p 43):

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary procedure under this rule … and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' … The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

(ii) whilst courts have realised that the 'power to dismiss an action summarily without permitting the appellants to proceed to trial is a drastic power' and that power 'should be exercised with the utmost caution' (see *Tractors Malaysia Bhd v Tio Che Hing* [1975] 2 MLJ 1) the courts have also recognised that such powers ought to be exercised, if warranted by sparing parties the cost and expense involved in preparing for a trial. In this regard, the third respondent refers to the judgment in *Gabriel Peters & Partners v Wee Chong Jin* [1998] 1 SLR 374, where Yong Pung How CJ opined:

> In general, it is only in plain and obvious cases that the power of striking out should be invoked. This was the view taken by Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86 at p 91. It should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the appellants/plaintiffs really has a cause of action. The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.

(iii) the guiding principle in determining what is a 'reasonable cause of action' is set out in *Drummond-Jackson v British Medical Association* which was quoted with approval in *Gabriel Peters & Partners*. The relevant passage of the judgment reads:

> The guiding principle in determining what a 'reasonable cause of action' is under O 18 r 19(1)(a) was succinctly pronounced by Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094. A reasonable cause of action, according to His Lordship, connotes a cause of action which has some chance of success when only the allegations in the pleading are considered.

(iv) the respondent is mindful of the provisions of O 18 r 19(2) of the Rules of the High Court 1980 ('RHC') which preclude affidavit evidence. It is only the allegations in the statement of claim which needs to be looked at. Thus, in order to decide if the pleadings disclose a reasonable cause of action, an examination of the statement of claim paragraph by paragraph, is inevitable. It cannot be helped if the pleadings here are lengthy in view of the number of parties involved and the various causes of action pleaded against them. However, the third respondent hastens to add that it is no reason to conclude that the summary procedure of striking out should not be resorted to merely because the statement of claim is lengthy;

(v) in the light of the appellants' failure to plead a reasonable cause of action, the appellants' claim against the third respondent is untenable and must fail. The respondent ought not to be dragged to court to answer what is patently an unsustainable claim in a trial expected to be long and lengthy in view of the number of defendants and separate causes of action pleaded against them. To defend the action would mean a waste of not only the third respondent's time and expense, but that of the court;

(vi) the claim against the third respondent is frivolous and vexatious within the meaning held in the case of *Goh Koon Suan v Heng Gek Kiau* [1992] 2 MLJ 307 where it was said:

> A proceeding is said to be vexatious when the party bringing it is not acting bona fide, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result: *Jowitt's Dictionary of English Law*.

(vii) the third respondent concedes that the fact the appellants' case is weak alone is no ground for striking out their case. This was implicit in the judgment in *Kim Hok Yung & Ors v Cooperative Centrale Raiffeisen-Boerenleenbank BA (t/a Rabobanl) (Lee Mon Sun, third party)* [2000] SLR 508 when the court held that:

> Thus, generally the courts may permit seemingly with cases to proceed to trial so that a plaintiff is not unfairly treated by being shut out before he has to present his evidence. By the same token, it is also unfair to compel a defendant to expend not only money but times and afford in

A defending and obviously unmeritorious case. Thus before a court strike out a claim on the ground that it is frivolous and vexatious it must satisfy itself that the claims is obviously unsustainable, or that it amounts to an abuse of the process of the court; of the latter, it has long being recognised that hopeless litigation or claims that are 'doomed to fail' fall into the category.

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(viii) the appellants' case is not merely weak, but one that is hopeless and bound to fail.

C (ix) the basic guidelines with regard to pleading is provided for in O 18 r 7, namely that: (i) they are concise statements of fact; and (ii) only material facts and not law or evidence is to be pleaded. Further, the statement must be as brief as the nature of the case admits. Where the statement of claim fails to comply with the rules of pleading, it will result in prejudice and embarrassment to the other party. This principle was reiterated in *Re Lee Siew Kow, deceased* [1951] MLJ 224 where Murray-Aynsley CJ said at p 225:

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> the basic principle is that the pleading must contain a statement in a summary form of the material facts … but not the evidence by which they are to be proved. The meaning of material facts is explained in the often cited passage of Cotton LJ in *Phillips v Phillips* (1878) 4 QBD 139:

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> > The pleading, not to be embarrassing to the defendants, should state the facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.

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(x) as to what constitutes 'material facts' was explained in the case of *Wong See Leng v Saraswathy Ammal* [1954] MLJ 141 where Buhagiar J said:

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> Now as stated in *Bullen and Leake's Precedents of Pleadings* (10th Ed) p 1:

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> > The principal objects of pleadings are firstly, to define issues of fact and questions of law to be decided between the parties; secondly, to give to each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial, and thirdly, to provide a brief summary of the case of each party, which is readily available for reference, and from the nature of the claim and the defence may be easily apprehended, and constitute a permanent record of the questions raised in the action, and of issues decided therein, so as to prevent future litigation upon matters already adjudicated upon between the litigants.

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In *Adib bin Mokhtar & Ors v Jason Chan Chee Khong & Anor* [1999] 2 MLJ 473 the importance of complying with O 18 r 7(1) was again restated in the judgment of Clement Skinner JC (as he then was) as follows:

> In *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at p 712, Scott LJ said:
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> > … The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' fact is omitted, the statement of claim is bad …
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> > It should hardly need stating then that the basic purpose of O 18 r 7(1) is to enable a defendant to know what it is that a plaintiff alleges against him and in doing so, the plaintiff is obliged to state facts sufficient to formulate a complete cause of action.

His Lordship further held that non-compliance with the object of pleadings in O 18 r 7(1) would 'open the way to vexatious litigation and abuse of process where claims or defences may be simply filed without the opposing party really knowing what is truly alleged …'. The respondent says that the appellants have offended the above principle with regard to pleadings in O 18 r 7(1). There is an obvious lack of clarity in the statement of claim making the claim against the third respondent uncertain. As a result, the third respondent is at a disadvantage in its ability to respond;

(xi) a perusal of the entire statement of claim shows allegations against the third respondent which are couched in alternatives, each statement laced with 'and/or' conjunctives. The appellants are clearly both uncertain and ambiguous as to their cause of action against the third respondent. One cannot but conclude that the appellants are in fact embarking on a fishing expedition. The appellants cannot be allowed to do so in the hope that the particulars to be provided by the third respondent in its defence would then make certain an uncertain claim;

(xii) the third respondent says that the appellants' statement of claim is similar to that in the case of *Thomas & Betts (SE Asia) v Ou Tin Joon* (27 February 1998, unreported) mentioned in *Tapematic Spa v Wirana Pte Ltd & Anor* [2002] 4 SLR 953 which attracted the following comments:

> The particulars given by the appellants/plaintiffs were at best vague and sweeping. It seemed to me that the appellants/plaintiffs were merely trying to frame their claim in the widest possible terms without the requisite particulars. It is a clear rule of pleading that 'every pleading must contain the necessary particulars of any claim (O 18 r 12 (1) of the RSC). In the absence of providing adequate particulars, and in the absence of

A any explanation as to why these particulars were inadequate, I was constrained in the finding that there were insufficient facts in the pleadings to support the cause of action. I did not think it fair that a appellants/plaintiffs should be allowed to allege first, and then through the process of discovery or interrogatories, hope to substantiate those B allegations later — that would be tantamount to 'fishing' which any court would vigilantly guard against in balancing the interests and rights of the parties concerned.

(xiii) apart from pleading ambiguous facts, the appellants have added C further confusion to its claim against the respondent by pleading law in para 16. The provisions of the particular law however, throws no further light on its claim against the third respondent. By pleading law here, the appellants have again violated the basic rules of pleading. In the case of *Hardial Singh Sekhon v Ahmad bin Haji* D *Ramli & Ors* [1981] MLJ 96, the statement of claim which 'comprised a mixture of law and facts together with what appeared to be the evidence in the case', was struck out as 'it was patently obvious ... that the defendants would be embarrassed in meeting the appellants' case'. Vohrah J then referred to a passage in *The Supreme* E *Court Practice 1979* which said:

> The rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down F by the law; and if a party introduces a pleading which is unnecessary; and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right (per Bowen LJ in *Knowles v Roberts* (1888) 38 Ch D 263, p 270).

G (xiv) as there are fundamental breaches of pleadings in the appellants' statement of claim, it ought to be struck out;

(xv) the above grounds taken cumulatively to strike out the appellants' statement of claim, tend to show that the appellants' suit is an abuse H of court process. The court ought not to allow itself to be improperly used as in this case where:

(i) the claim is so obviously unsustainable;

(ii) no reasonable cause of action is disclosed I

(iii) the pleadings are unclear, vague, ambiguous, speculative, uncertain and materially violates rules of pleading;

(iv) the suit for breach of contract is one which in law ought to be against the first defendant;

(v) on the facts as pleaded, the relief is one which in law supports a claim against the first defendant;

(vi) the third respondent has been improperly cited as a defendant.

[8] I have read the application, affidavits and submissions in detail. The principles and practice relating to strike out pleadings are well settled and I have dealt with them in a number of cases, to mention a few are as follows: (i) *Ng Wu Hong v Abraham Verghese a/l TV Abraham & Ors* [2008] 7 MLJ 45; and (ii) *Crystal Realty Marketing Sdn Bhd v Hicom United Leasing Sdn Bhd* [2008] 1 MLJ 142. I do not wish to repeat them. The principles can be further summarised as follows: The courts will only dismiss an action: (i) in plain and obvious case; (ii) where there is no reasonable cause of action; (iii) to avoid unnecessary trial which has no prospect of success; (iv) the claims are frivolous, or vexatious or an abuse of process of court or the defences are unarguable. For the purpose of this appeal, I am inclined to accept the arguments of the respondent except on one issue. In this case the plaintiffs say that the third defendant's liability arises, pursuant to Labour Ordinance of Sarawak ('LOS'). Under the LOS, the third defendant, being the principal or employer, is liable to its contractor and subcontractor for all works and/or services contained in any contract of works and/or services where the principal or employer. The definition reads as follows:

> 'Employer' includes the Federal and State Governments and any person or body of persons corporate or unincorporated and the legal personal representative of a deceased employer who or which enters into any agreement or contract with any worker and the duly authorized agent or manager of such person or body of persons and, where any person (hereinafter referred to as the principal) in the course of or for the purposes of his trade or business enters into any agreement or contract with any other person (hereinafter referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be held to be the employer

This is a matter which warrants the court to allow the plaintiffs to sustain the action.

[9] For reasons stated above, I allow the appeal. The costs shall be in cause. I further direct:

(i) the third defendant to file the defence within five working days from the date of this decision;

(ii) the plaintiff to file Form 63 for case management within 14 days from the receipt of the defence;

(iii) the case be fixed for case management on 24 August 2007;

A (iv) the matter be fixed for trial within two months from the date of this decision.

Appeal allowed with costs in the cause.

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Reported by Chew Phye Ken

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